Appendix A

Dres. ~~Dormann~~, Voss, von Döhren, Todsen
Rechtsanwälte
bei dem Hanseatischen Oberlandesgericht,
dem Land- und Amtsgericht in Hamburg
~~Dr. A. Dormann~~
Dr. von Döhren auch Steuerberater
~~Mitglied des NSRB.~~

(24) Hamburg 1, den 29th October 1945
Alsterdamm 15 I.
Fernsprecher: 32 47 17 und 32 47 21

FIELDMARSHALL SIR BERNARD L. MONTGOMERY,
G.C.B. , D.S.O.

P E T I T I O N

With reference to § 10 of the Regulations for the Trial of War Criminals, I, as Defending Counsel, have the honour to submit the following petition against the finding and sentence which was passed on

Kapitänleutnant Heinz E c k ,

on October 20th, 1945.

According to the opinion of the defence the following facts are regarded as established and are the result of the evidence:

On January 18th, 1944, U 852 left the harbour of Kiel with the order to operate in the Indian Ocean. The boat called at Christiansand and entered the North Atlantic between Iceland and the Faroer-Islands. The entire North Atlantic was crossed in underwater running. The boat only surfaced as often as this was necessary in regard to the charging of batteries. The Commandant and his crew were much affected by the hardships of the long cruise when running submerged.

On March 13th, in other words: after a 55-days voyage, U 852 had advanced as far as to the area between Freetown and Ascension. At about 18.00 in the evening the Greak steamer "Peleus" was sighted in this area. U 852 was running surfaced. It chased the "Peleus" until about 20.00. After the outbreak of darkness, at about 20.00, the "Peleus" was sunk with two torpedoes in an attack on the surface.

declaration of Kapitänleutnant Heinz Eck.

Both torpedoes hit the ship deadly. It sank within about three minutes. Immediately after the sinking the crew of the submarine - as far as it was stationed on the bridge of the U-boat - heard cries and whistles originating from the few survivors. Shortly after this lights were noticed on the rafts which had evidently been automatically ignited. One of the rafts was hailed to the submarine. Stavros Sogias, the third officer of the "Peleus" was on this raft. He climbed over to the submarine and was interrogated by Kapitänleutnant Lenz (Capt.Lt. Eng.). A fter this interrogation the third officer of the "Peleus" went back to his raft und put off from the submarine.

Kapitänleutnant Lenz reported the result of the interrogation to the commandant who was on the bridge. The commandant, Kapitänleutnant Eck, then ordered that all traces of the sinking should be eliminated. Kapitänleutnant Lenz opposed to this order because he considered it a necessary consequence of this order that all survivors would have to perish too. Regardless of this, Kapitänleutnant Eck insisted, however, that his order should be carried out (compare the statement made by Kapitänleutnant Lenz in the protocoll taken by Mr. Mossop on July 6th, 1944).

During the evidence it was later on no more possible to determine the exact wording of the order given by the commandant. It is, however,not to be considered as proved that the commandant had given the order to shoot directly on survivors. According to the statements of all accused which show that they were all conform in this point it becomes clear that the order was only given to sink wreckage and rafts by shooting. When issuing this order Kapitänleutnant Eck knew well that in sinking the wreckage and the rafts there was practically almost no possibility for the survivors to save their lives.

From 20.30 onwards until 01.00 in the morning of the following day the wreckage and the rafts were shot at intermittently. When doing so machine-guns and, later on, also 2 cm-guns were used. A total of three hand-grenades were thrown on the rafts. According to the statements of the commandant the machine-guns were put into action because only by this means it was considered possible to perforate the buoyancy tanks of the rafts and to sink them thus. During the whole time of the shooting the signal lamp was switched on only once because - as Kapitänleutnant Eck declared - it was not to be understood why the rafts did not sink.

Hand-weapons, namely pistols and machine-pistols, which were brought to the bridge shortly after the sinking but before hailing the one raft, were not used during the shooting. Hand-weapons were brought to the bridge by order of the commandant only because he wanted to safeguard his boat and his crew when interrogating the survivors.

Korvettenkapitän Schnee, one of the most experienced submarine-commandants of the German Navy and an expert witness, confirmed the fact that the sinking of the rafts - if at all possible - could only have been carried out by using machine-guns. The flat targets which, moreover, were only at a short distance from the submarine could not have been destroyed with the one 10,5 cm cannon stationed on board. The 2 cm-weapon was used on account of its higher explosive effect.

It is not to be regarded as proved that any raft was hailed to come nearer after the interrogation of the third officer of the "Peleus" was finished. All accused and the German witnesses too have declared that such a second hail was not made. Moreover, no member of the submarine crew had heard anybody shouting at any time: "Kill them all!" No member of the submarine crew saw any survivors on the rafts being shot at during the time of the shooting. It is, however, admitted by the defence that survivors have been on the rafts during the time of shooting. The contradiction might be explained by the fact that the few survivors who still remained on the rafts in spite of the shooting had bent down and sought refuge under the benches, and therefore, they could not have been watched in the darkness.

The following facts are to be established:

1.) that rafts were shot at
2.) that at the time of shooting survivors were on several rafts but not on all
3.) that survivors were not watched by the crew of the submarine during the shooting
4.) that none of those who used the weapons had taken survivors under fire
5.) that no order had been given to shoot directly on the survivors.

Having established this the defence comes to the conclusion that the commandant in giving the shooting order exclusively intended to sink the rafts and the pieces of wreckage. He did not intend, however, to kill survivors by aiming at them directly. On the other hand, the commandant knew well that after the sinking of the rafts and the wreckage there was almost no possibility for the survivors to rescue their lives.

According to the opinion of the defence the purpose persued by the commandant when issuing his order was exclusively:

" to eliminate all trace of the sinking ".

According to the entire circumstances only those traces could have been regarded as "traces of the sinking which were to be eliminated " which possibly could have been observed by air reconnaissance. The commandant was, for several reasons, fully aware of the danger that resulted for the submarine and its crew from the air reconnaissance - reaons which will be dealt with in detail on the following pages. Single beams, smaller wreckage parts and a few survivors who were swimming in the water or who were grasping at such small pieces of wreckage and beams were not to be considered as dangerous with regard to air reconnaissance. Larger pieces of wreckage, above all rafts, offered, however, the risk that air reconnaissance could already ascertain the scene of the sinking on the following morning and would, therefore, be able to suspect the presence of submarines in this area. This is the only thing the commandant wanted to prevent.

The reasons which led the commandant to the conclusion that there was a direct and actual danger for his boat and his crew, namely to be recognized by air reconnaissance owing to the traces of the sinking were as follows:

Korvettenkapitän Schnee, as witness, confirmed the fact that before commandant Eck put to sea he had pointed out to him the special danger which threatened every submarine ordered to operate in the Indian Ocean and, in particular, in the area between Freetown and Ascension as far as air reconnaissance is concerned. Korvettenkapitän Schnee who belonged to the Staff of Grossadmiral Dönitz supervised the operations of the submarines on account of the extensive experiences he himself had gained at the front. According to German opinion the area between Freetown and Ascension was especially dangerous owing to the fact that air bases were established in Freetown as well as in Ascension and air reconnaissance flights could be

carried out in this area. At the beginning of 1944 only isolated German submarines operated in the area of Freetown and Ascension. If air reconnaissance, therefore, only suspected the presence of a submarine in this area, the ennemy could - according to German opinion - concentrate his entire defence forces on the individually operating submarine. In particular with regard to the possibility that the entire defence forces could be concentrated on a single target did the situation of danger which prevailed in the area of Freetown and Ascension differ very much from that in the area of the North Atlantic.

In the North Atlantic a majority of submarines were continously operating on the convoy routes. This was known to the ennemy. In consequence in this zone it could not be so important to keep secret the presence of a submarine which was, all the same, continously suspected by the ennemy. It was, therefore, even unnecessary to wipe out by all means every trace of the sinking in the North Atlantic. On the other hand, the air defence in the North Atlantic was never able to concentrate its entire defence force on a single target as there were always several German submarines operating in the area of action and the defence had therefore always to attack several targets at the same time.

This was known to the Staff of Grossadmiral Dönitz, and Korvettenkapitän Schnee had expressly pointed out to commandant Eck that a number of submarines that had received the same operation order as Eck were lost on their route to the Indian Ocean in the Southern Atlantic. In the case of commandant Rollmann it had become known that the loss of his U-boat was due to air reconnaissance. In the other cases the same cause of loss was assumed. The submarine U 852 which was commanded by commandant Eck was a 1000-tons boat. The submarines U 847, U 848, U 849, U 850 and U 851 belonged to the same class. All theses submarines had formerly received the same operation orders as Eck. All of them were commanded by the most experienced submarine commandants who were at the disposal of the German Navy. With one exception, all of these submarine commandants were bearers of the "Ritterkreuz" (Knight's Cross). They were all lost in the area between Freetown and Ascension. When still marching through the North Atlantic the news of the latest losses that were suffered in this area were broadcasted to Kapitänleutnant Eck. These news ought to have impressed Eck all the more since he already approached the area of danger where the losses had occurred.

It results from the statement of Kapitänleutnant Eck that he had twice noticed aeroplanes in the area of his submarine during the days immediately before the sinking of the "Peleus". One aeroplane was identified by radar location , a second aeroplane had been sighted. In both cases it was possible to evade discovery by immediate diving. But now Eck knew for certain that he had to take into consideration a vigilant air reconnaissance.

In connection with this it is also important to cite the statement of the first officer of the "Peleus", Liossis, who expressly stated that his raft sighted an aeroplane on the fourth day following the sinking and, that on the fifth day another aeroplane flew directly over the raft. Who could have told Eck that not already on the morning after the sinking an aeroplane would have passed the scene of sinking and would thus sight the remainders of the ship?

Due to the long underwater cruise which Eck had already endured when crossing the North Atlantic he was now forced to run surfaced more often if the fighting ability of his crew should not wholly break down. This forced him on the other hand to take good care of excluding every possibility of a discovery due to traces of sinking. If the case should arise he could remove his boat from the sight of aeroplanes at every time by immediate diving. Traces of sinking, however, which Eck left behind could later on - after having run away - not be wiped out if this would have become necessary in the case of an approach of an ennemy aircraft. These traces would have remained permanent and would have implied the danger of discovery at all times. Valuating all these reasons objectively one cannot deny that the leaving of traces which are easily to be perceived would have meant in fact an immediate danger of discovery.

In the course of the Trial the Court raised the question whether Eck would not have had the possibility to withdraw himself from the attacks of any aeroplanes by leaving the scene of the sinking immediately and with full speed instead of occupying himself for hours and hours with the removal of the traces of the sinking. Korvettenkapitän Schnee answered this question in declaring expressly that an immediate flight, even when running at full speed, would not have withdrawn the submarine from the direct grasp of air attacks. Considering the possibilities of radar location, it may be calculated with mathematical accuracy that only a few

aeroplanes which could probably have been engaged in air reconnaissance on the next day would have been sufficient to cover with their radar sets every single spot of the water surface within the circle where Eck must still be on the next day. Korvettenkapitän Schnee has, therefore, stated very plainly that an immediate leaving of the scene of sinking could not have reduced the danger for Eck to such an extent as to exclude a threatening and immediate danger. On the other Hand, Korvettenkapitän Schnee confirmed the fact that the elimination of the traces of sinking which were easiliy to be perceived must indeed have reduced to a large degree the danger to which Eck was exposed.

The Legal Advocate has, furthermore, put the question to Korvettenkapitän Schnee whether he, as an experienced submarine commandant, would have acted in the same way as Eck. Hereupon Schnee answered that to-day he could not put himself into the same condition as Eck had found himself at that time. Notwithstanding the fact that it is rather impossible to put oneself in a fighting situation in a Court Room after a war has ended it has, moreover, to be stated that Schnee had gained no practical experiences by the conditions as they were at the front in 1944. Schnee was for the last time at the front in 1942. From 1942 to 1944 the technique of anti-submarine warfare had considerably improved. If Schnee, upon the insistance of the Court, finally declared that he would not have acted in the same way as Eck, the question remained open which steps Schnee would then actually have taken in order to withdraw his boat and his crew from the immediate threatening danger. This question is all the more plausible as Schnee had declared - only a short time ago - that an immediate leaving of the scene of sinking would - according to his own opinion - have meant no solution of the problem. To-day it is impossible to give an objective answer to the question, whether Eck would have had the possibility to save his boat and its crew without eliminating the traces of sinking. Those commandants who - at about the same time - were operating in the same area as Eck, and whose answer to this question could alone be taken into consideration, have all been lost together with their boats.

An objective answer with regard to the probability which could have been taken into consideration for the saving of U 852 can in no case be of striking importance for the result of the decision. It is sufficient to ascertain that in any case Eck

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was under the impression that he could only save his boat if he eliminated all traces of the sinking. If Eck was under this impression, he then acted from a purely subjective point of view in a situation which did not leave him any decision of his own free will and which, therefore, precluded his guilt, his mens rea. Without guilt, without mens rea, a criminal reproach can, however, not be made. With regard to this, special reference is made to the reports in the attached opinion of Prof. Wegener.

According to the opinion of the defence, the Legal Advocate in summing up the Trial has not informed the Court of the fact that the precondition for a condemnation is not only the establishment of a committed wrong, but, moreover, also the establishment of a guilt, of a mens rea. According to the opinion of the defence, the Court has, consequently, not dealt with the question whether Eck acted on the basis of a psychological compulsion which excluded the mens rea. But the defence lays special stress above all on this question considering the fact that in regard to the objective judgement of the danger of the situation and the possibility to escape in another way too, many doubts may still exist, doubts which furthermore - according to the principle "in dubio pro reo" - would have to be interpreted for the benefit of the accused. The defence is of the opinion that it would have been the task of the prosecution to submit proof, according to the result of which it would have been beyond all reasonalbe doubt:

1.) that there was a possibility for Eck to escape also without eliminating all traces of the sinking,

2.) that Eck knew of this possibility when he decided to eliminate these traces of the sinking.

This proof, however, was not submitted by the prosecution.

When judging the psychological compulsion in which Eck found himself - according to the opinion of the defence - the fact should not be overlooked that Eck was no experienced submarine commandant, that this was, moreover, his first cruise as commandant, that the "Peleus" was the first ship he sank in his quality as commandant, that he was already very much affected by the fatigues of the long underwater cruise through the North Atlantic, and that the report of losses which reached him during the cruise had impressed him very much. In particular in the Llandovery Castle Case, it is pointed out that much weight must be placed on the circumstance

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that decisions of far reaching importance muss often be taken with the greatest speed on the basis of insufficient actual material. The Reichsgericht wished to express hereby that it is not admissable to judge decisions taken in actual fighting situations by standards which are easily - even if wrongly - taken in the dispassionate atmosphere of a Court Room.

The defence is conscious of the fact that the result of the evidence does not permit an interpretation of only one view. The defence thinks, however, that it may be allowed to state that the interpretation of the result of evidence represented by it, can - when appreciating all details of the case - lay claim to be much more plausible than that opinion of the prosecution which attributes the intention to the accused to have killed survivors of the "Peleus" solely for the sake of mere brutality. In this case too, the old maxim is valid: " In dubio pro reo " and every doubt as to the correctness of the opinion, taken by the prosecution, should be regarded for the benefit of the accused Eck.

The sentence of the Court was passed in the name of human justice. In this case it is a question of life and death, a decision which is not taken in war and during actual fighting, but a decision concerning the wrong and guilt, the basis of which is solely a striving for justice. More than in other cases - according of the opinion of the defence - the knowledge that all human striving for justice is only imperfect as feelings and emotions influence every human decision, should be regarded as being of the greatest importance when it comes to a decision concerning life and death. Therefore, more than in any other case, when coming to a decision concerning life or death, the old Roman wisdom is of importance according to which the imperfection of human knowledge ought to be interpreted in favour of the accused.

The defence thinks to act by its deepest conviction, and solely in the service of justice when it implores that in this case the death sentence should not be confirmed.

Defending Counsel

Dr. Laternser

Enclosures:

1. Judicial opinion of Professor Dr. Wegener

2. Personal declaration of Kapitänleutnant Eck.

Appendix B

Opinion by Dr.Arthur Wegner,Professor of Law.

The defence maintains that Kapitänleutnant E c k acted in an extreme emergency. Throughout the trial and now, Dr.Todsen has defended Kapitänleutnant Eck by emphasizing that emergency, basing his defence upon facts proved by sufficient evidence.

It must be considered:

1. Whether that emergency amounted to a necessity of self-defence, recognised in international law, and especially by British authorities, as a ground of justification.

2. Whether the emergency, though not at all justifying the act, does still excuse Captain Eck and his crew, the necessity affording a ground of exculpation, though not of justification. It must be stressed from the very beginning that we are not concerned with a perverse attempt to justify any wrong that may have been done, but with the problem of guilt which is the central question of criminal responsibility,and must be very clearly distinguished from the statement that a wrong has been committed. A "not guilty" is absolutely compatible with the condemnation of an act because of its being wrong.

3. Whether it does or does not matter that Captain Eck was in error about some facts which, had they happened to be existent, would have constituted an emergency, at least in the meaning of (2), i.e., a situation that did not render his act lawful, but still prevents us from finding him guilty, his guilty knowledge, his mens rea, being excluded by a situation of psychological compulsion. Here the question arises: whether that psychological situation was the same when those facts did not actually exist, but were only erroneously imagined by Captain Eck, in a kind of delusion to which, by analogy, this rule from another sphere of Criminal Law might apply: "A party labouring under a partial delusion must be considered in the same situation, as to responsibility, as if the facts, in respect to which the delusion exists were real" (Macnagten", Case, see News' Digest of English Case Law, 2nd edition, VI, London 1925, p. 315 "The prisoner may..... suffer from some particular delusion as to the surrounding facts, which prevents his apprehension of the true nature of his act. In such circumstances his liability will depend

upon the character of the delusion. He is to be considered in the same situation as to responsibility, as if the facts with respect to which the delusion exists were real." (Stephen's Commentaries on the Laws of England, 19th ed. Radically revised and largely rewritten. Vol. IV. Criminal Law by C.H.S. Fifoot, 1928).

(1)

Before going into the details of the subjective and psychological problems connected with (2) and (3), we have first to deal with the objective presupposition: whether there are "International Rights of Self-Preservation" entitling Captain Eck to his act. "International Rights of Self-Preservation" is the title of Chapter VIII of "The Collected Papers of John Westlake on Public International Law," edited by L. Oppenheim (Cambridge, 1914). In connection with the Caroline Case, John Westlake, whom some experts (e.g., Professor Brierly in Oxford) consider the author of the best English text-book on International Law, says that then, in 1838, the United States of America declared that it lay on England "to show a necessity of self defence, instant, overwhelming, leaving no choice of means and no moment for deliberation.... also that the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive, since the act justified by the necessity of self-defence must be limited by that necessity and kept clearly within it." Commenting on this, Westlake adds: "This was a correct statement of the law, except so far as concerns the emergency's leaving no moment for deliberation, which is an unnecessary condition if the emergency is such that deliberation can only confirm the propriety of the act of self-preservation." (Westlake, Collected Papers, 1914, p. 117/118).

This is absolutely compatible with what Westlake writes (on p. 243 ff of "Collected Papers") against that doctrine of raison de guerre as a danger to International Law. I have in the same way rejected all militaristic doctrines on nécissité de la guerre and Kriegsraison, raison de guerre (see my book on Kriminelles Unrecht, Staatsunrecht und Völkerrecht, 1925, p. 30 ff). And I have even more than Westlake limited the defense based on emergency and necessity by stressing that it is mainly a problem of guilt, like our "Notstand" in Criminal Law (Reichsstrafgesetzbuch §54). I do not even differ from L. Oppenheim, International Law Vol. II. Disputes, War and Neutrality, 5th ed. by H. Lauterpacht, 1935, p. 194, but I am rather still more anxious to be strict and conservative in the interpretation of the laws and usages of war. On the other hand, Oppenheim deals at great length with Self-Preservation in his Vol. I (4th ed. by McNair, 1928) p. 256 ff. And in Oppenheim-Lauterpacht (Vol. II, 5th ed., 1935) we read on p. 703: "Since necessity in the interest

of self-preservation is, according to International Law, in certain cases an excuse for an illegal act, a belligerent may seize such persons and despatches, provided that their seizure is not merely desirable, but absolutely necessary in the interest of self-defence. For instance, seizure of an enemy ambassador on board a neutral vessel would be justifiable if he was on the way to submit to a neutral a draft treaty of alliance injurious to the other belligerent."

Hershey (The Essentials of International Public Law, New York, 1923, p. 353 n. 13) remarks: "The principle of military necessity is thus modified by considerations of enlightened self-interest as well as of humanity. It must not be confounded with the false doctrine of military necessity (Kriegsraison) maintained by some German authorities.... Military necessity does not justify a violation of the rules of civilized warfare." I have much more passionately fought against the false militaristic doctrine of nécessité de la guerre. I never admitted that mere military necessity as such might justify a violation of the rules of civilized warfare. At the same time, however, I pointed out that it is nonsense to see in the militaristic doctrine of nécessité de la guerre a German invention (see my Kriminelles Unrecht, Staatsunrecht und Völkerrecht, 1925, p. 31, 32, 33).

Hershey, too, dwells at great length on "The Right of Self-Preservation" (The Essentials of International Law p. 144 ff.).

(2)

Necessity, however, may have a meaning that differs from a real right of self-defence and self-preservation. It may be an excuse, but not a justification, a psychological situation of compulsion, but not a primary right and international competence entitling to a special act of self-preservation and making it lawful. Thus, for instance, is the difference of the self-defence in §53 Reichsstrafgesetzbuch (Notwehr) from the necessity or emergency in §54 Reichsstrafgesetzbuch (Notstand). I may claim that I have been rather cautious in examining the question whether such an excuse may be admitted in International Law. In my first book on war crimes (Kriminelles Unrecht, Staatsunrecht und Völkerrecht, 1925, p. 34) I called attention to the objections which were raised by Lammasch. But one case, at least, I considered an undoubtable excuse. It is this case: where an immediate danger for the life of his comrades compels the soldier to act in the same way as he who sees the life of his relatives endangered. The close relationship in which the soldier finds himself with his troops, the sailor with his ship and, most especially, the commandant with the crew of his submarine, in an emergency threatening death and destruction, constitutes that

did lose his nerves, as most people, i.e., the ordinary man, the average, would have done too. The act that had been committed was wrong. There is no use in asking now, under different and peaceful circumstances: What would I have done? We are always only too inclined to suppose that we might have done the right thing instead of the wrong. What we have to do, is: to weigh the circumstances of the moment in which the accused acted and to ask: Was he, then, a normal man? Criminalists have compared that emergency which is a ground of exculpation to insanity.

(3)

In Criminal Law it has been stressed by many authors and judges that for our judgment on the psychological situation in which a man acted it does not matter whether some facts actually existed or were only imagined by him. Thus a delusion may equal an actual situation. That is not only so in cases of abnormal minds, in cases of insanity. Professor Kohlrausch (of Berlin University) states: the psychological and legal effect is the same, whether the accused really was in an emergency and necessity or, in error about some facts, only thought he was. This is the opinion also adopted by the Supreme Court.

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After taking into consideration the legal effect which an eventual error as to the emergency, the necessity might have, we must say another word on error and criminal responsibility in the case of Kapitänleutnant Eck. It seems that the sentence of the War Crimes Court against Kapitänleutnant Eck claims to be based to a large extent on the decision of our German Supreme Court, the Reichsgericht, in the Llandovery Castle Case. But there it was stated: "Freilich muß dem Täter die Völkerrechtswidrigkeit seines Tuns bewußt sein." "Indeed, he who committed the act must have known that it was against the law of nations."

The problem of error is again one of guilt. It is the question whether the accused had a guilty knowledge, a mens rea. "The general rule of law is that a person cannot be convicted in a proceeding of a criminal nature unless it can be shown that he had a guilty mind." (News' Digest of English Case Law VI, 2nd ed, 1925, p. 275). In war crimes there are special difficulties resulting from conflicts between the atmosphere of an army or navy and pre-war conceptions of International Law (see my Kriminelles Unrecht, Staatsunrecht und Völkerrecht, 1925, p. 35/36). The ideas on the right of self-preservation, necessity of self-defence and nécessité de la guerre (the militaristic doctrine of which I have always rejected) are a particularly important source of errors ever since they have been overstressed by the dogma of Sovereign-

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The problem of error is again one of guilt. It is the question whether the accused had a guilty knowledge, a mens rea. "The general rule of law is that a person cannot be convicted in a proceeding of a criminal nature unless it can be shown that he had a guilty mind." (News' Digest of English Case Law VI, 2nd ed, 1925, p. 275). In war crimes there are special difficulties resulting from conflicts between the atmosphere of an army or navy and pre-war conceptions of International Law (see my Kriminelles Unrecht, Staatsunrecht und Völkerrecht, 1925, p. 35/36). The ideas on the right of self-preservation, necessity of self-defence and nécessité de la guerre (the militaristic doctrine of which I have always rejected) are a particularly important source of errors ever since they have been overstressed by the dogma of Sovereign-

ty as gradually developed during the last six centuries.

Practically the individual knows the rules of warfare because they have been transferred into the law of his own country and he has been taught by his national authorities what his international duties are. Certainly, International Law ought to be the supreme law of the country. But national pride, in all countries, overemphasized the dogma of national Sovereignty, tending to deny or even to despise International Law. I may mention that this evil tendency, against which I have always fought in all my books and essays, is also very strong in some quarters of English and American jurisprudence, especially in that part of it which is represented by Austin and his school. Most modern writers of that school of thought openly teach an outspoken "National jurisprudence," discarding Divine as well as public International Law. It is by such tendencies that, since the second half of the last century the way has been paved for the totalitarian contention that there be no universal truth and law, but that, instead of it, the will and command of the nation have a supreme and absolute value, claiming that the individual's whole and undivided loyalty, all that the State can enforce. It was Austin who defined and stressed force as the essential element of law. All this is utterly wrong. But if a heresy like this prevails even among so many famous lawyers of almost every country, the individual must be excused to some extent for a confusion in his conceptions as to right and wrong. - And: if the States do not know, how can the individual know?

If judges want to impress a misled crowd by real justice, they must stick to the sacred rules of the Rechtsstaat when dealing with war crimes and war criminals and most especially with those who are erroneously accused. As the basis of any sentence, of any punishment the Rechtsstaat requires a Tatbestand. This word means much more than the actual facts of the case. That is an imperfect translation, not rendering completely into English what the German student of Criminal Law imagines and thinks when he pronounces the word Tatbestand. A mere "norm", a vague imperative is not sufficient for punishment. There must be laid down in law the typical elements of the act or omission. And it is these elements that the guilty knowledge, the mens rea, the guilty mind of the criminal must have comprehended.

Albrecht Mendelssohn Bartholdy, once, when writing on International Penal Law (in: Vergleichende Darstellung des deutschen und ausländischen Strafrechtes), admonished us: never to forget the Tatbestand which, in this connection, is so easily forgotten. I called attention to this admonition and exhortation to think of the most simple and

elementary securities of legal and juridical technique in my essay "Über den Geltungsbereich des staatlichen Strafrechtes" which I contributed to the "Festgabe für Reinhard von Frank"(Tübingen, Mohr, 1930). It was forgetting the Tatbestand, too, when in Kapitänleutnant Eck's case it was said that there was no need to distinguish between Murder and Manslaughter, and when, evidently, the difficult distinctions of § 47 Militärstrafgesetzbuch were neglected.

The first pernicious "reform" of criminal law that the Nationalsocialists achieved was the abolition of the old and just law: Nullum crimen sine lege, nulla poena sine lege. We, as lawyers, have the great task and mission to prevent people of our time from reacting against Nationalsocialism by imitating, without knowing that they do so, its worst methods. It is imitating Nationalsocialists methods when we judge the accused by a law which was enacted after he had committed his act and which he could not know while he was acting. If whole nations and states waver, e.g. as to the questions of just and unjust wars, necessity, self-defence etc., we must not suppose the accused individual to know exactly and firmly that what he did was wrong, that he had a guilty knowledge of a law, or rather legal idea,which then was not yet lex lata, but, perhaps, lex ferenda.

I am fully aware of the objection already raised during this trial: That the German Supreme Court, the Reichsgericht, by its decision in the Llandovery Castle Case, has settled everything, and established, for the German minds, what has to be considered the law for a U-boat Commandant in such cases. But (quite apart from the fact that submarine warfare has been radically changed by the development of the airforce since then) actually the psychological situation is not like that. Just as a lawyer who has always defended that decision of our Supreme Court against nationalist~~ialist~~ circles,I know only too well the tremendous criticism directed against it from the very beginning. Mild and comparatively objective books published against it were:"Kriegsverbrecher-Prozess gegen die U-Boot-Offiziere Dithmar-Boldt" herausgegeben und verlegt von der Marine-Offizier-Hilfe e.V."(quite objective style), "Das Urteil im Leipziger U-Boot-Prozess, ein Fehlspruch?" "Juristische und militärische Gutachten von Vize-Admiral a.D.Michelsen" (1922) Leading men of the German navy never accepted that decision in the Llandovery Castle Case,that sentence against the U-Boat-Officers Dithmar and Boldt.

Oberreichsmilitäranwalt Dethleffsen in "Michelsen, Das Urteil im Leipziger U-Boot-Prozess, ein Fehlspruch", and Vizeadmiral Michelsen himself maintained that in maritime warfare there are exceptions to the rules protecting the lives of ship-wrecked enemies, of survivors of sunk vessels. His contention is that maritime warfare differs in this from land warfare (Hague convention Art. 23 c) that it is not so easy for a submarine to make prisoners to whom the rule of land warfare protecting those who have ceased to be combattants generally applies.Survivors of a sunk ship may still remain combattants, they often return to their country and its army and navy. I do not agree with such contentions. Nor do we suppose that this particular idea played a part in Captain Eck's considerations: He did not fire at human beings, but at wreckage. He did not want to kill people, but to eliminate all traces of the sinking. However, the wide-spread circulation of such criticism against the unpopular sentence of our Supreme Court (Reichsgericht) in the Llandovery Castle Case must be taken into consideration when deciding whether the accused had a guilty knowledge, the mens rea, or whether he believed to do the right thing from a military as well as the legal point of view.

When the mind of the younger generation to which Kapitänleutnant Eck and his men belong, was moulded, there was not only criticism like that of Michelsen and other dignified people, but there was unlimited agitation against the Leipzig trials and all those who had taken part in them as judges or prosecutors, or who had defended the sentences. They were often treated as if they were traitors and their judgement shameful treason.

This does not mean that a U-boat Commandant or the High Command of the German submarine warfare claimed a general right to fire at life-boats, rafts and shipwrecked survivors.There had been a new development of the International Law relating to submarine warfare which those young German naval officers welcomed. The Stated matured by experience had abandoned the idea of the Washington Convention of February 6th,1922, Article 3, which wanted to treat submarine commandants in certain cases as pirates. That was substituted by the London Treaty of April 22, 1930, and the London Protocoll of November 6th,1936. But the new law worked only during the first period of the war. Then,indeed, German sailors had made very effort to save the lives of those whose ships they had sunk. But conditions changed owing to facts as these: Merchantmen were generally armed (and well armed). The development became also

similar to that in the war of 1914 to 1918 in so far as whole seas or large parts of an ocean were declared war-zones. There maritime warfare became more or less unrestricted.

Moreover, it was alleged that British ships had fired at German survivors, whose ships had been sunk by the British Navy. Mentioning these rumours does not mean taking them very seriously. There is but secondary and, as Major Lermon called this sort of thing during the trial, even only tertiary evidence for it. We do not know whether a single witness would stand the test of cross-examination - as in the trial of Kapitänleutnant Eck we neither heard a single survivor cross-examined in the witness-box, but only the dead letters of their affidavits readby the prosecution.

When I heard those affidavits read, I was reminded of what many seamen had told me during five years that I was interned with them. I did not believe all they told me. But the fact is there that German sailors believed the British Navy had fired at survivors. Higher officers mentioned, when I asked for particulars, Narvik and some other places, where this was said to have happened. At the same time German seamen told how kindly they were saved and generously treated by the British Navy.But whether in some cases the British Navy acted under the necessity of self-defence or only an operational necessity, or whether German sailors mistook firing at quite different aims for firing at themselves, I do not know. The only fact that comes out quite clearly and seems to be important is this: That there has been a wide-spread belief in some British usage to fire at life-boats and rafts in extreme emergencies.Such an assumption, however erroneous it may be, must be considered in connection with the question whether Captain Eck and his officers and men had a guilty knowledge, a guilty mind, a mens rea.

But mainly concentrating on the question of guilt (which we often call the subjective Tatbestand) we must also emphasize, that there are objective reasons, too,which eliminate Kapitänleutnant Eck's responsibility. Not only to his officers and men, but also to himself, these sentences of the Caroline Case apply: "that an individual forming part of a public force and acting under the authority of his Government is not to be held answerable as a private trespasser or malefactor' What such an individual performed was a " public act, done by persons in her Majesty's service, acting in obedience to superior orders, and that the responsibility, if any, rested with her Majesty's Government."

This is no other practice and principle than that to which Major Lermon referred when he quoted the maxim: Only the States, but not the individuals are subjects of International Law.

Criminal proceedings will not help to clear, but only obscure the historical issue.

Soon after the last war great British Naval officers and lawyers did all they could to secure justice and a more generous appreciation to the German Navy. Heinrich Pohl, in his book "Der Deutsche Unterseebootkrieg" (1925) mentions, e.g. C.M. Faure, Rear Admiral William S. Sims, and Sir Graham Bower. Sir Graham Bower I met myself in 1932 at the Oxford Conference of the International Law - Association, whose member I have the honour to be, and until he died he was kind enough to write many letters to me on these problems.

A short time before revolutionary developments made peaceful progress impossible, there were hopeful indications of a change of public opinion in the whole world on German warfare during the first world war. The world began to understand Germany's situation much better and to do our country more justice (see my contribution Festschrift for Max Fleischmann, Zeitschrift für Völkerrecht, Vol. XVI (1932), p.764 - 785 : "Vom Wandel des Welturteils über die deutsche Kriegsführung". Zugleich ein Beitrag zu einigen seekriegsrechtlichen Lehres des Weltkrieges)" In America, e.g. Professor Trimble fought against Garner for better justice towards Germany.

I have no doubt, that also the passions of to-day will pass and be replaced by calmer and more peaceful judgement on war-crimes and alleged German war-crimes.

Hamburg, October 29th, 1945.

Dr. Arthur Wegner, Professor of Law.

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Appendix C

Personal Declaration of
Kapitänleutnant E c k.

1. The Court was not convinced of the necessity of the measures which I took, and which confronted me at the time of the deed. The Court continuously pointed out the fact, that it would have been better to leave the scene of sinking with full speed.

My tactical considerations at that time were and had to be the following:

The Commander of the Submarine Fleet repeatedly pointed out the special dangerousness of the passage Freetown-Natal and Freetown-Ascension-Natal to me. The loss of a large number of boats on the journey through the Southern Atlantic was considered to be a result of a strong air reconnaissance in this territory, and it was presumed that a heavily fortified air base had been recently located on the Ascension Island. I myself had twice sighted airplanes in this area, although I hardly came to the surface during the daytime.

When the "Peleus" was sunk I was situated right on the border of the mentioned danger area, and now intended to travel on the surface also during the daytime. And it was high time to do this, for the crew was on the verge of its efficiency due to the long travel below the surface.

Following the sinking of the "Peleus" I knew very well that I could not carry out this plan of mine, if the opponent would be informed of the sinking, and, therefore, of the presence of a submarine in this area. Even if it was not possible for the "Peleus" to radio an S O S - Signal - the sinking was too sudden and powerful in order to do this - it would have been possible for patrol planes to discover the spot where the sinking took place already within the next few days in the first place on the basis of the signal aids which certainly were present on the life rafts, and, in the second place, by the evident and by "Radar"-apparatuses detectable pieces of wreckage and floats. (Not by traces of oil!)

I expected no air reconnaissance during the night itself, since I principally only had to count on reconnaisance by day. Regardless of this, I had in any case own wireless detector which had to protect me from all surprises in operation throughout the whole night, I also felt no concern for the next day, because then I could travel submerged, which I also did.

For the following days, however, and for the next 14 days during my southward journey, I had the most serious scruples. I had to count with the fact, that following the discovery of the sinking

a pursuit and attack upon me would immediately be taken up, for the opponent could have no doubt as to my course resp. my direction of advance. I then had to count on the concentrated pursuit by the airforce from the African air bases, including Capetown and aircraft-carriers, as well as by destroyers and submarine chasers. I was not even in the position to man a wireless detector apparatus during the entire time of my advance, since the apparatuses on board were already so seriously affected and used, that I had to save them for the most urgent cases of a short pursuit resp. in the zone of operation. In fact I was neither pursued nor attacked during the 17 day progress of my journey to Capetown. As a contrast to this, the boat commanded by Kapitänleutnant Herwartz, which was traveling through the South Atlantic at about the same time, however west of Ascension, between Ascension and the American coast, was very soon, i.e. a few days after the sinking of a ship, pursued, attacked and heavily damaged.

This case and the fact that the survivors of the "Peleus" had sighted an airplane on the 4th and 5th day each of their drifting on the float, confirms without a question of doubt the correctness and logic of the tactical considerations which I took at that time.

2. According to the statements of the survivors, the major part of the crew had swum in the water and had clung to the wreckage and beams following the sinking of the "Peleus". How can even a survivor swimming in the water or being on a float determine in the dark of the night, how many persons are swimming in the water ? According to my opinion he can only make a rough guess from the cries and whistles, which, as a matter of fact, were also heard by me. These cries and whistles had already ceased at the time of the interrogation of a member of the crew, i.e. that now the major part of the crew of the sunken ship, which probably was in a position to keep itself above water for only a short time, had drowned. The effect of the shock and the injuries may have played a role in this. In fact two of the floats were provided with lights and were manned by 4 survivors. The lights were then extinguished at my order, and one of these two floats came alongside of us together with a third, from which the one man who was on the third float, climbed to the other, on which were now three men. As a contrast to these, there were no persons on all other floats, unless it may have been possible that they had hid themselves. When the machine-gun fire was opened on the floats, doubtlessly only those which were not manned were first shot at. Since no person was to be seen also on the other floats, I took for granted that they had jumped into the water, which according to my experience is the natural reaction. It was, however, not absolutely

to be seen in advance, as the witnesses declare, that they withdrew themsdves from our sight by crouching down and hiding, and, thus, were hit by the machine-gun fire.

I took the measure of destroying the traces of the sinking, because of the above tactical and military reasons, and this measure seemed to me not ~~able~~ possible to be prevented and urgently necessary. I had believed that through my order, I had to fulfill the obligation which was laid down to me through the responsibility as commandant for boat and crew.

Heinz Eck. Kptl.